IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-6413

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SUPREME COURT, U.S.

CHRISTOPHER A. BURGER,

Petitioner,

v.

WALTER ZANT, Warden
Georgia Diagnostic and
Classification Center,

Respondent

A-755

APPLICATION FOR STAY OF EXECUTION OF SENTENCE OF DEATH PENDING DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

To the Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice of the Eleventh Circuit.

Petitioner, Christopher A. Burger, by counsel, prays that an order be entered staying execution of his sentence of death currently set for March 27, 1984 pending disposition by this Court of his Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit which was docketed in this Court on March 14, 1984.

In support of the Application for Stay, Petitioner states:

1.) Petitioner, Christopher Burger, who was seventeen (17) years old at the time of the offense, was convicted of murder and sentenced to death on January 25, 1978 in the Superior Court of Wayne County, Georgia. On appeal to the Supreme Court of Georgia, the conviction was affirmed, but the death sentence was vacated and the case remanded for retrial solely on the issue of penalty. Burger v. State, 242 Ga. 28, 247 S.E.2d 854 (1978).

2.) On retrial, Christopher Burger was resentenced to death. The death sentence was affirmed on appeal. Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980).

3.) After exhaustion of state post-conviction remedies, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Georgia. On April 29, 1981, the district court granted habeas corpus relief vacating Petitioner's sentence of death only, denying relief on all other grounds alleged. Burger v. Zant, 513 F.Supp. 772 (S.D. Ga. 1981).

4.) An appeal and cross-appeal of the district court's order were made to the United States Court of Appeals for the Eleventh Circuit. A panel of the Eleventh Circuit, by a vote of 2-1, in an opinion by Circuit Judge Vance, reversed the district court's grant of habeas corpus relief and affirmed the district court in all other respects, effectively reinstating Petitioner's sentence of death. Circuit Judge Johnson dissented with an opinion. Burger v. Zant, 718 F.2d 979 (11th Cir. 1983), rehearing en banc denied, ___ F.2d ___ (Feb. 13, 1984).

5.) On February 27, 1984, the Eleventh Circuit, per Judge Vance, denied a motion to stay the mandate pending application for certiorari. The mandate of the Eleventh Circuit was issued that date. (A copy of the order denying a stay of mandate is attached hereto as Appendix A).

6.) On March 14, 1984, Petitioner's Petition for Writ of Certiorari was docketed in this Court as No. 83-6413.

7.) On March 15, 1984, the Superior Court of Wayne County, Georgia ordered that Christopher Burger's sentence of death be executed on March 27, 1984. Undersigned counsel received notice of this execution date by mail on Saturday, March 17, 1984. (A copy of the sentencing order is attached as Appendix B).

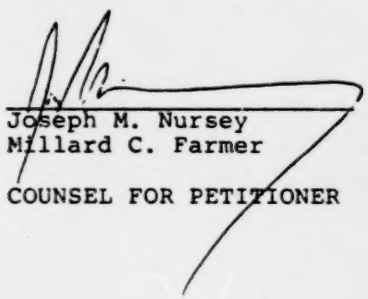
8.) Petitioner's Petition for Writ of Certiorari contains two (2) issues which are currently before this Court in other cases. The Petition raises the issue of a burden shifting jury instruction that "a person of sound mind and discretion is presumed to intend the material and probable consequences of his acts." This issue is before this Court in Koehler v. Engle, cert. granted, ___ U.S. ___, 104 S.Ct. 231 (1983).

The Petition also raises the issue of ineffective assistance of trial counsel due to his failure to adequately investigate and prepare for the sentencing phase of Christopher Burger's capital trial. This issue is before this Court in Washington v. Strickland, cert. granted, ___ U.S. ___, 103 S.Ct. 2451 (1983).

9.) Petitioner's Petition for Writ of Certiorari raises two (2) other meritorious issues: (a) whether seventeen (17) year old Christopher Burger, an indigent person of very low intelligence and possibly brain damaged, was denied the effective assistance of counsel where his appointed trial and appellate counsel also actively represented Christopher Burger's more culpable, adult co-defendant; (b) whether a death sentence may be constitutionally imposed based solely upon the aggravating circumstance set out in Ga. Code Ann. §27-2534.1(b)(7) ["the offense of murder was outrageously and wantonly vile, horrible or inhumane in that it involved torture, depravity of mind or an aggravated battery to the victim."].

WHEREFORE, based on this Application for Stay and the Petition for Writ of Certiorari previously docketed with this Court, Petitioner respectfully requests an order staying execution of his sentence of death pending disposition of his Petition for Writ of Certiorari.

Respectfully submitted,



Joseph M. Nursey
Millard C. Farmer

COUNSEL FOR PETITIONER

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Mr. Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 19th day of March, 1984.

Joseph M. Nursey
COUNSEL FOR CHRISTOPHER BURGER

P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
FEB 27 1984
SPENCER D. MERCER
CLERK

No. 81-7419

CHRISTOPHER A. BURGER,

Plaintiff-Appellee,
Cross-Appellant,

versus

WALTER A. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Defendant-Appellant,
Cross-Appellee.

- - - - - - -

Appeal from the United States District Court for the
Southern District of Georgia

- - - - - - -

O R D E R:

IT IS ORDERED that the motion of appellee/cross-appellant for stay of mandate pending application for certiorari is Denied

UNITED STATES CIRCUIT JUDGE

APPENDIX A

MOT-6H

IN THE SUPERIOR COURT OF WAYNE COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA,	§	
-vs-	§	INDICTMENT 77-1641
CHRISTOPHER A. BURGER,	§	CHARGE: MURDER
DEFENDANT.	§	

AMENDED ORDER

The Supreme Court of Georgia having returned the remittitur in this case to the Superior Court of Wayne County, Georgia, on the 16th day of March, 1981, affirming the verdict and sentence of death; the trial jury having found the defendant guilty of murder and having fixed his punishment at death; subsequent thereto the abovesaid case was appealed to the Federal Court, Southern District of Georgia, Federal Judge Avant Edenfield presiding, who set the death penalty aside; this federal verdict was appealed by the State of Georgia, and same was reversed by the Federal Appellate Court; and the Federal Appellate Court affirmed the state trial court's verdict of guilty and sentence of death, remittitur of the Federal Appellate Court having been filed in the Southern District of Georgia on March 6, 1984.

IT IS ORDERED AND ADJUDGED by this Court that on March 27, 1984, the defendant, **CHRISTOPHER A. BURGER**, shall be executed by the Director of the State Department of Offender Rehabilitation, in the manner herein provided by law, at such penal institution as may be designated by said Director and witnessed only by the executing officer, defendant's relatives, counsel, and such friends and clergyman as he may desire.

IT IS SO ORDERED this 15th day of March, 1984.

Robert L. Scoggin
ROBERT L. SCOGGIN
SENIOR JUDGE, SUPERIOR COURTS
BRUNSWICK JUDICIAL CIRCUIT

FILED IN OFFICE THIS 15th
DAY OF March 1984
Faye D. Graham
CLERK Superior COURT
WAYNE COUNTY, GA

APPENDIX B